

No. 89-159

AUG 25 1989

In The
Supreme Court of the United States
October Term, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

vs.

PARK SHORE MARINA, ET AL.,

Respondents.

BRIEF OF RESPONDENT
LAKESHORE PRODUCTS, INC.
IN OPPOSITION TO PETITION FOR CERTIORARI

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**COUNTER-STATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

A. Where the wooden deck sections manufactured by Lakeshore Products, Inc., which were incorporated into a completed dock by a separate entity, are not defective or dangerous in and of themselves, is there a duty to warn of known, open or obvious dangers?

B. Assuming the existence of a duty to warn, was the failure by the manufacturer of a component part to provide warnings concerning the danger or diving into shallow water the proximate cause of Petitioner's injuries where there is no allegation that the deck section in and of itself caused or aggravated Petitioner's actual injury?

C. Where Federal Court jurisdiction was based upon a diversity citizenship, and the ruling of the Federal District Court is based solely upon interpretation of Michigan common law, is there a substantial federal question meriting review by the United States Supreme Court?

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STATUTE INVOLVED - NONE
COUNTER-STATEMENT OF THE CASE

Respondent Lakeshore Products, Inc. accepts the Statement of the Case supplied by Petitioner, Herbert H. Johnson, Jr. with the following exceptions.

Petitioner cites MCLA 600.2925 as the statute involved. This statute, which in and of itself provides no substantive remedy or relief, was nowhere plead or raised in the lower courts. The citation to this definitional section adds nothing to the merits of this case.

Petitioner asserts at page 4 of the Petition for Writ of Certiorari that he was not told how shallow the water was at the end of the dock. This contention was vigorously disputed. There is testimony from Third-party Defendant, Arthur Anderson, who was present on the dock immediately before the Petitioner dove into the water that he told the Petitioner that the water was about three feet deep. (Arthur D. Anderson at TR 32-36)

There is also a dispute concerning the amount of alcohol Petitioner consumed prior to the incident. Although Herbert Johnson testified that he had one beer en route to the Anderson home (Herbert Johnson at TR 17) and got another can of beer after he had been at the Anderson home, (Herbert Johnson at TR 32) a blood alcohol test taken after Petitioner's admission to the hospital revealed the Petitioner's blood alcohol level was .19.

With regard to Respondent Lakeshore Products, Inc., it was the undisputed testimony of James Starr, 50% owner of Lakeshore Products, Inc., that 99% of the sales

of Lakeshore Products, Inc. was wholesale. (James Starr at TR 65)

In Petitioner's Brief filed in response to the initial Motion for Summary Judgment, it was stated:

Johnson agrees with Lakeshore Products, first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in which the wood was fastened together, played no role in this accident." (R.108: Brief by Plaintiff in opposition to Defendant Lakeshore Products, Motion for Summary Judgment at p 4)

In affirming the Order of Summary Judgment in favor of the Defendants, the Sixth Circuit Court of Appeals adopted Plaintiff's agreement that there was no fault in the dock itself. The Court of Appeals, in affirming the decision of the Federal District Court, held that Petitioner both failed to establish that the alleged defects were a proximate cause of his injuries, and further Petitioner failed to establish there was a duty which had been breached by the Respondents.

SUMMARY OF ARGUMENT

The only products supplied by Respondent Lakeshore Products, Inc. were sections of wooden deck. Few items could be simpler. Because the product is simple and because any dangers were, as the District Court found, known and obvious, there is no duty to warn.

Furthermore, Michigan Courts have consistently held that the supplier of component parts, not dangerous in and of themselves, is under no duty to warn of a defect

which depends upon the integration of the component into a completed unit. If there is a duty to provide some warning in this case, it is not the duty of Respondent Lakeshore Products, Inc., the mere supplier of a component part.

Finally, Petitioner has failed to establish, as outlined in Rule 17 of the United States Supreme Court, a substantial federal question which would merit the review of this matter on a Writ of Certiorari.

ARGUMENT

I

RESPONDENT LAKESHORE PRODUCTS, INC. HAD NO DUTY TO PROVIDE WARNINGS FOR USE BECAUSE (A) ITS PRODUCT WAS NEITHER DEFECTIVE NOR DANGEROUS AND ANY RISK WAS KNOWN OR OBVIOUS, AND (B) IT WAS MERELY THE SUPPLIER OF A COMPONENT PART OF THE FINAL PRODUCT.

A. BECAUSE THE PRODUCT OF RESPONDENT LAKESHORE PRODUCTS, INC., A WOODEN DECK, WAS NEITHER DEFECTIVE NOR DANGEROUS, THERE WAS NO DUTY TO PROVIDE EITHER WARNINGS OR INSTRUCTIONS.

There was no dispute in the trial court as to the nature of Petitioner's claim against Respondent Lakeshore Products, Inc.:

Johnson agrees with Lakeshore Products, first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in

which the wood was fastened together, played no role in this accident". (R.108: Brief by Petitioner in Opposition to Respondent Lakeshore Products, Motion for Summary Judgment, at p 4)

The sole claim of a product "defect" against Respondent Lakeshore Products, Inc. was that it failed to provide some type of warning concerning the danger of diving into shallow water.

Petitioner's analysis of this question is erroneous because it begins with an incorrect assertion of Michigan law, misstates the issues and does not understand the nature of the product involved.

First, with regard to the law in Michigan concerning a duty to warn, the Michigan Supreme Court in *Antcliff v State Employees Credit Union*, 414 Mich 624, 638-639; 327 NW2d 814 (1982) held:

In sum, our prior decisions support a policy that a manufacturer's standard of care includes the dissemination of such information, whether styled as warnings or instructions, as is appropriate for the safe use of its product. If warnings or instructions are required, the information provided must be adequate, accurate and effective. (footnote omitted)

* * *

This policy has limits. It has been applied in instances where the product itself had dangerous propensities. Out of recognition that the manufacturers interests are also entitled to protection, **this policy has not been applied in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous.** *Fisher v Johnson Milk Co., Inc.*, 383 Mich 158; 174 NW2d 752

(1970) (wire milk bottle carrier) See also Anno: *Products Liability-Duty to Warn*, 76 ALR2d 9, 28-37, and cases cited therein. (Emphasis added)

Simply put, where the product itself is not defective or dangerous, there is no duty to warn or to provide warnings or instructions of known or obvious product-connected dangers.

This was the holding of the District Court in this case:

Because the dock itself was not defective, and because the dangers of diving into shallow water, while perhaps under-appreciated, are well-known, I cannot find that the Defendants had any duty to warn Plaintiff of the risk posed by his decision to dive into Diamond Lake. (R:119 Opinion of Federal District Court, at p 12)

In *Fisher v Johnson Milk Co., Inc.*, 383 Mich 158, 160-161; 174 NW2d 752 (1970) the Michigan Supreme Court addressed the issue of the duty of a manufacturer to warn or protect against dangers obvious to all.

There was no inherent, hidden or concealed defect in the wire carrier. Its manner of constructions, how the bottles would rest in it, and what might happen if it were dropped, upright, on a hard surface below, with the possibility that the contained bottles might break, was plain enough to be seen by anyone including a patent attorney as well as a milk dealer. There is no duty to warn or protect against dangers obvious to all. *Jamieson v Woodward & Lothrop* (1959), 101 App DC 32 (247 F2d 23). In so holding in support of the trial court's summary judgment for defendant that court said:

'there are . . . on the market vast numbers of potentially dangerous products as to which the manufacturer owes no duty of warning or other protection. The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous, object; but, if a person accidentally slips and falls on a pencil point in his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly, inherently dangerous, because they might slip. . . . A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers.

Seen in the light of the clear holdings in *Antcliff* and *Fisher*, Petitioner's reliance upon *Owens v Allis Chalmers*, 414 Mich 413; 326 NW2d 372 (1982) is misplaced. Analysis of the *Owens* case must begin with the Michigan Supreme Court's own statement that *Fisher v Johnson Milk Co., Inc.* still applied to simple product or tools (*Owens*, 414 Mich at 425) and that " . . . this is not a 'duty to warn, case . . . " (*Owens*, 414 Mich at 427).

In *Owens*, plaintiff alleged there was some type of design defect in the vehicle itself which caused the accident, alleged that the stability of the forklift which caused the death of plaintiff's decedent had not been properly tested, and also alleged that the design of the forklift was defective for failing to provide some type of factory-installed driver restraint. 414 Mich at 417.

Implicit in the *Owens* Court's citation to *Fisher* was its acknowledgement that it still applied to simple products.

Furthermore, the plaintiff in *Owens* alleged a defect in the product, consisting of either a lack of stability or the absence of a driver restraint system. Such is not present in the case at bar. Petitioner's sole allegation against Respondent Lakeshore Products, Inc. is failure to provide a warning. The wooden deck section itself was not claimed to be faulty.

Petitioner argues that somehow *Owens v Allis Chalmers Corporation* did away with the simple tool or product doctrine. The fallacy of this argument can be seen simply by comparing the Supreme Court holding in *Owens* with its holding in *Antcliff*. Note that the decision in *Antcliff* came one month after *Owens*. Judge Enslen, in footnote 1 of the Opinion, correctly found "*Owens* to be inapposite to the case at bar" R 119: Opinion of Federal District Court at page 14.

Similarly, *Michigan Mutual Insurance Co v Heatilator Fireplace*, 422 Mich 148; 366 NW2d 202 (1985) still finds the Michigan Supreme Court using the *Fisher* analysis of whether a product is a simple tool in order to decide whether or not there was a duty to warn. In that case the

Court held that a prefabricated "zero-clearance" fireplace, was not a simple tool. 422 Mich at 152.

Based upon this clear understanding of the State of Michigan law, Petitioner's reliance on *Pettis v Nalco Chemical Co.*, 150 Mich 294; 388 NW2d 343 (1986) is misplaced. The Michigan Court of Appeals in *Pettis* specifically found and held that the product in that case was **not** a simple tool:

We find that Defendant owed a legal duty to provide warnings with its products. While Nalcasil is not classified as a "chemical" by the company, **it is not a simple substance** which is used in everyday life. It is specifically manufactured for use with molten steel. It is not at all obvious to a person of common intelligence that its use could create the danger of an explosion of the steel or of an explosion of such great force as to splatter great quantities of steel out of a large mold. 150 Mich App at 302. (Emphasis added)

Similarly, *Smith v E. R. Squibb & Sons*, 405 Mich 79; 273 NW2d 476 (1978) addresses a product, a prescription drug, which has a totally separate and distinct duty to warn.

A manufacturer of a prescription drug has a legal duty to warn the medical profession, not the patient, of any risks inherent in the use of the drug which the manufacturer know or should know to exist. 405 Mich at 88. (Emphasis added)

It is also apparent from a review of the opinion in *Smith*, that it did not address the question of whether or not a warning should be given, but rather whether or not a warning which had been given was adequate.

The *Antcliff* Court noted that once a manufacturer of a proprietary product undertakes to direct or recommend the manner in which the product should be used it is then held to the duty of exercising reasonable care in giving such direction. 414 Mich at 636. *Smith* deals with a duty to warn which arises under two distinct rules, neither of which apply in this case.

In *Hill v Husky Briquetting, Inc.*, 54 Mich App 17; 220 NW2d 137 (1974) cited by Petitioner, the sole question addressed by the Court of Appeals was

Where a manufacturer of a product undertakes to explain or give warnings on the label concerning the use or propensities of its product and the explanation or warning is stipulated to be "the average standard in the industry", has the manufacturer, as a matter of law, discharged its assumed duty to make a statement which is adequate under all the facts and circumstances?
54 Mich App at 21

This is not the issue in the case at bar. In *Hill* the Court found the manufacturer assumed duty. The present case addresses the issue of whether there is a duty to warn at all. That issue was not addressed in *Hill*. Rather, the Court's analysis hinged upon whether a manufacturer had given an adequate warning where it had already undertaken to give such warnings.

Therefore, *Fisher v Johnson Milk Co., Inc.*, *supra*, and *Antcliff v State Employees Credit Union*, *supra*, are controlling on the issue of whether there is a duty to warn when there is a simple tool or product with a known and obvious danger.

It is well-settled law that the question of duty is to be resolved by the court rather than the jury. *Pettis v Nalco Chemical Co.*, 150 Mich App at 302, citing *Antcliff v State Employees Credit Union*, 414 Mich App 64. With this understanding, it is clear the court acted properly in granting the Motion for Summary Judgment.

B. RESPONDENT LAKESHORE PRODUCTS, INC., AS A COMPONENT SUPPLIER OF A SIMPLE PRODUCT, NOT DANGEROUS OR DEFECTIVE IN ITSELF, HAD NO DUTY TO WARN PETITIONER OF POTENTIAL DANGERS AS A RESULT OF USING A FINISHED PRODUCT WHICH INCORPORATED THE COMPONENT.

Respondent, Lakeshore Products, Inc., was the manufacturer of wooden deck sections that were later incorporated by Respondent Park Shore Marina into the finished dock. As a component supplier, Respondent Lakeshore Products, Inc., simply manufactured the wooden deck sections to Respondent Park Shore's specifications, but had no knowledge as to where the placement of the finished dock, or the depth of the water. Petitioner seeks to hold Respondent Lakeshore Products, Inc., liable for its manufacture of wooden deck sections, not defective or dangerous by themselves, because of its failure to warn Petitioner of potential dangers in using the finished dock. The Petitioner goes too far in attempting to extend liability to Respondent Lakeshore Products, Inc.

Petitioner furthermore misstates or confuses the nature of the product involved. Respondent Lakeshore Products, Inc. did not manufacture or supply "an 80 foot

long dock that ends in shallow water". (petitioner Herbert H. Johnson, Jr.'s Brief on Appeal, STATEMENT OF ISSUES I and II at p 2 in the Brief on Appeal to the Sixth Circuit Court of Appeals) The Petition for Writ of Certiorari makes the same assumption, without openly stating so.

The "product" of Lakeshore Products, Inc. was not a wooden dock, but simply wooden deck sections. As the fabricator of the wooden deck sections, Respondent Lakeshore Products, Inc. did not manufacture a dock which ended in shallow water; in fact the facts clearly show that Lakeshore Products, Inc. had no knowledge of the depth of the water into which the dock would be placed.

The Michigan Court of Appeals in *Jordan v Whiting Corporation*, 49 Mich App 481; 212 NW2d 324 (1973); affirmed 396 Mich 145; 240 NW2d 468 (1976) addressed the duty of component manufacturers to warn of potential dangers of the finished product.

In *Jordan* the plaintiff's decedent attempted to place liability on a component manufacturer of a portion of a crane which electrocuted the decedent. Whiting Corporation manufactured components which were ordered and bought from it by another defendant. The component parts by themselves were not dangerous or defective. The Court held as follows with regard to the component manufacturer's obligation:

The obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not – at least yet – extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can be potentially dangerous dependent upon

the nature of their integration into the unit designed, assembled, installed and sold by another. *Jordan*, 49 Mich App at 481.

The *Jordan* case states that the component manufacturer of a part not in and of itself dangerous or defective has no duty to avoid injury to another using the finished part.

Jordan is applicable to the present situation in that Respondent Lakeshore Products, Inc., as a component manufacturer of the wooden deck sections, not in and of themselves dangerous or defective, had no duty to warn Petitioner of potential dangers in using the finished dock. The extension of liability to Lakeshore Products, Inc. is unreasonable in light of the *Jordan* case.

The Michigan Supreme Court in *Antcliff v State Employees Credit Union* addressed a similar issue. The product in *Antcliff* was a scaffold manufactured by Spider Staging Sales Co., Inc., but was incorporated into a support system and rigging by the plaintiff. The Michigan Supreme Court in affirming a finding of the Court of Appeals that there was no duty to warn or give directions for safe rigging, stated:

In the instant case, Spider manufactured the scaffold which happened to be involved in a construction site accident. The scaffold was not found by the jury to be defective. The most that can be said of the accident is that the load-bearing capacity of the rigging system designed by plaintiff Howard Antcliff and his co-worker was insufficient to support the powered scaffold. This led to the system's collapse. We are unable to conclude that the scaffold's weight was a dangerous propensity which necessitates vindication of the policy. In addition, plaintiff

Howard Antcliff and his co-worker were both journeyman painters. In view of their knowledge and experience as riggers, we feel constrained to charge them with full appreciation of the danger of inadequately supporting the scaffold on which they worked. As a result, **the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require Spider to provide instructions for the safe rigging of its product.**

Moreover, the contrary conclusion would lead to demonstrably unfair and unintended results. There are countless skilled operations such as the rigging of scaffolding, which involve otherwise nondangerous products in potentially dangerous situations. A manufacturer of such a product should be able to presume mastery of the basic operation. The more so when, as here, the manufacturer affirmatively and successfully limits the market of its product to professionals. In such a case, the manufacturer should not be burdened with the often difficult task of providing instructions on how to properly perform the basic operation. 414 Mich at 639-640.

The same principles apply by analogy in this case. There is not even an allegation that the wooden deck section was in some manner defective apart from the alleged failure to warn. Respondent Lakeshore Products, Inc. supplied 99% of its products to wholesalers, in this particular instance, the Respondent Park Shore Marina. As noted above, Respondent Lakeshore Products, Inc. had no knowledge of the lake upon which this deck was to be installed or the depth of the water over which it was to be used. It supplied its product, a wooden deck, to a professional which had been to the specific location on several

occasions, having initially installed the wooden deck section in 1984. Where a professional incorporates a simple product into a completed assembly, the manufacturer of the component should not be required to provide warnings.

In *Bullock v Gulf and Western Manufacturing*, 128 Mich App 316; 340 NW2d 294 (1983) it was alleged that a safety device was missing on a press. The Court of Appeals affirmed a directed verdict in favor of the press manufacturer. In affirming the dismissal of plaintiff's claim that there was a defect in the product, the court noted that the component punch press was, by itself harmless until it was assembled with a die. In the same manner, in the case at bar, the deck section itself in this case was harmless, and if it became unsafe at all, it only became so upon installation by someone into shallow water. It should be noted at this point that it is the testimony of Respondent Lakeshore Products, Inc. that 99% of its sales are to wholesalers, that is to marinas and not to private individuals.

An additional point raised in *Bullock* is that where the specific dangers are fully known, there is no duty to warn. In this instance, it is the testimony of both Park Shore Marina and the Andersons that they were aware of the dangers of diving into shallow water.

Petitioner's reliance on *Horen v Coleco Industries, Inc.*, 169 Mich App 725; ___ NW2d ___ (1988) is misplaced which can clearly be seen by comparing the simple deck section in this case with the "product" in *Horen*:

On July 3, 1981, while visiting the home of his parents-in-law, Mr. and Mrs. Ralph Cox, 33 year-

old William Horen began swimming in the Cox's above-ground outdoor swimming pool which had been manufactured in 1978 by Defendant Coleco, Industries, Inc. **The pool, measuring 24 feet in diameter, contained a water depth of between four and five feet and was surrounded by side walls to which a large, manufacturer-supplied deck** had been attached. (Emphasis added) 169 Mich App at 727.

The court also noted that there was a small faded, peeling warning label on the chain-link wall adjoining the deck.

Coleco Industries supplied the pool itself, and also supplied an attached deck. It would have known when it supplied the attached deck that the depth of the water would be four to five feet into which a dive would take place.

Furthermore, the Michigan Court of Appeals in *Horen* misunderstood the application of *Owens v. Allis Chalmers Corporation, supra*. This is evident as nowhere in *Horen* did the Court address the above cited analysis in *Antcliff v State Employee Credit Union*, nor did it address the analysis performed by the Michigan Supreme Court of the simple tool doctrine in the case which it did cite, *Michigan Mutual Insurance Co. vs Heatilator Fireplace*, 422 Mich 148; 366 NW2d 202 (1985). Again, both *Antcliff* and *Michigan Mutual Insurance Co.* are post *Owens* cases and both involve the analysis of a product to determine whether it was a simple tool in determining whether there is a duty to warn.

Failure to understand the decision of the Supreme Court in *Owens* and *Antcliff* explains the apparent inconsistency between *Horen* and *Hensley v The Muskin Corporation*, 65 Mich App 662; 238 NW2d 342 (1975). The plaintiff

in *Hensley* dove from a seven foot high garage roof into a four foot deep swimming pool. The plaintiff alleged that defendants had a duty to warn that a person should not dive into the pool. Citing *Fisher v Johnson Milk Co.*, *supra*, the Court of Appeals held in *Hensley*:

Neither the manufacturer, the seller nor the brother-in-law were under any duty to warn this plaintiff of an obviously dangerous use of an otherwise non-dangerous product. 65 Mich App at 663.

The *Horen* finding is premised upon its belief that *Hensley* was no longer valid since it viewed *Owens* as having imposed a duty to warn in all cases. Further, in *Horen* the Court discussed whether the question of duty was one of law for the court or whether it was for the jury to decide. There is an alternate explanation for the *Horen* court allowing the issue to go to the jury.

As noted above, in both *Antcliff v State Employees Credit Union*, and in *Smith v E. R. Squibb*, the Michigan courts have held that where a manufacturer assumes a duty to warn, it must do so in a reasonable manner. The appellate decision in *Horen* specifically noted the presence of "... only one small, faded and peeling warning label", which plaintiff denied seeing. 169 Mich App at 727. The *Horen* court could easily have found the issue to be one for jury determination by reasoning that whether the attempted warning was exercising "reasonable care commensurate with the dangers involved in giving such directions" was for a jury determination.

The product in *Horen* is distinguishable from the present case. *Horen* addressed the pool **and** its attached, manufacturer-supplied deck as a single product. As such,

the depth of the water was within the control of the manufacturer. This is an important distinction, as Respondent Lakeshore Products, Inc. had no such knowledge or control:

I cannot find that the dock manufacturers have a duty to warn because they have no control over, nor any responsibility for the depth of the water on which the products are placed. (R. 119: Federal District Court Opinion, at p 12, footnote omitted)

ARGUMENT

II

AN ALLEGED FAILURE TO WARN OF THE DANGER OF DIVING INTO SHALLOW WATER WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURY, WHERE THERE WAS NO DEFECT IN THE PRODUCT.

The Michigan Supreme Court has held that "the question of proximate cause, like the question of duty, is 'essentially a problem of law' ". *Moning v Alfonso*, 400 Mich 424, 440; 254 NW2d 759 (1977) Petitioner in this case simply did not show that anything which Respondent Lakeshore Products, Inc. did contributed to or caused his injuries in any fashion.

In its analysis, the Federal District Court correctly determined that in all the cases cited by Petitioner there was something about the product which proximately caused the Petitioner's injuries. (R. 119: Opinion of Federal District Court at p 8).

In *Pettis v Nalco Chemical Co.*, *supra*, the explosion was caused because the product exploded when it came into contact with hot molten steel.

The District Court also cited *Thomas v International Harvester Co.*, 57 Mich App 79; 225 NW2d 175 (1974). In that case injury occurred when a bearing manufactured of brittle steel chipped and flew into the plaintiff's eye. Again, in that case, it was some property of the product itself, brittleness, which caused the injury.

In the present case, Petitioner is unable to identify any property of the wooden deck section which was in itself defective or which caused Petitioner's injury.

Petitioner misunderstood, and misconstrued the Federal District Court's statement that Petitioner could as easily have been injured by diving from a cliff or a dune. In doing so, the Federal District Court properly noted that no characteristic of the deck caused Petitioner's injury. The breach of duty in this instance was the failure of the property owner to warn of the shallowness of the lake, not the duty of a component supplier to warn of a non-existent defect in its product. As Judge Enslen found in his Opinion, Petitioner has an action against the owners of the property pending in the Illinois State Court. (R. 119: Opinion of Federal District Court at p 2) See also Title Page of transcript of deposition of Herbert H. Johnson, Jr. of November 17, 1986, identified in Petitioner's Addendum Designation of Appendix Contents.

Petitioner cited the *Moning* case for the proposition that a jury must be allowed to consider what is reasonable conduct for the manufacturers and installers of docks in light of their knowledge of the serious injuries

which can result from the foreseeable use of their products. (Petitioner's brief at p 17-18). However, the *Moning* case states that:

"(t)he balancing of the magnitude of risk in the utility of the actor's conduct requires a consideration by the court and jury of the societal interest involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases." *Moning*, 400 Mich at 425.

The District Court in its Opinion made just such a finding:

(F)inding a duty to warn here would be like finding that an asphalt manufacturer had the duty to warn automobile accident victims that being thrown onto asphalt paving after a car accident, would cause them to injure themselves. Assuming that the paving was properly done, the fact that the street is paved has little if any connection to the injuries caused by automobile accidents. (Opinion of the Federal District Court at p 15)

Another analogy to the present case is the situation where the manufacturer of brake pads on an automobile has no duty to warn of dangers involved with driving a vehicle. In this case, Petitioner is attempting to extend liability too far by placing a duty to warn on a component manufacturer of a product not dangerous or defective in itself for potential dangers of a finished product.

Petitioner also appears to argue that the issue of proximate cause is one of fact which at all times must be decided by a jury, as opposed to a decision of law for the

Court. First, this legal contention is inaccurate, as noted from the above-cited language from *Moning v Alfonso*. Second, Petitioner chose not to argue this issue before the Federal District Court, and cannot now be heard to raise this issue for the first time upon appeal.

ARGUMENT

III

PETITIONER HAS FAILED TO ESTABLISH ANY SUBSTANTIAL QUESTION MERITING REVIEW BY THE UNITED STATES SUPREME COURT.

Rule 17 of the United States Supreme Court provides guidelines to litigants of the standards which the Court will use in reviewing Petition for Writs of Certiorari. Petitioner has failed to establish any substantial federal question meriting or requiring review by this Court.

Petitioner has failed to allege the involvement of a federal question for the simple reason that none exists. This case was filed in the United States District Court on the basis of its diversity jurisdiction, and revolves entirely around issues of Michigan substantive law. There were not at the time of filing, just as there are not now, federal questions requiring decision by the United States Supreme Court.

There are no constitutional issues framed in this case. Neither has Petitioner established that there is a conflict among the Federal Circuit Courts of Appeal.

This case is a routine personal injury case which was fully and fairly heard in the United States District Court on the basis of its diversity of citizenship jurisdiction.

Petitioner had a full and fair review of these issues by the Sixth Circuit Court of Appeals. Petitioner has failed to establish any basis to justify a review by the United States Supreme Court.

CONCLUSION

Under Michigan law, Respondent Lakeshore Products, Inc. had no duty to warn under the factual circumstances of this case. Furthermore, Petitioner has failed to establish any facts which would allow a finding that failure to warn was a proximate cause of Petitioner's injuries. Petitioner has further failed to establish a substantial federal question meriting review by the United States Supreme Court.

Therefore, Respondent Lakeshore Products, Inc. prays that this Court deny the Petition for Writ of Certiorari, and award to it such costs, fees and damages as may be merited in the case.

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